No. 540

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA

v.

HARRY GRAY NUGENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit reversing respondent's conviction for refusal to submit to induction.

OPINION BELOW

The opinion of the Court of Appeals (R. 85-91) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 10, 1952 (R. 91). On December 5, 1952, Mr. Justice Jackson extended the time for

filing a petition for a writ of certiorari until January 9, 1953 (R. 97). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b) (2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Section 6(j) of the Selective Service Act of 1948 (*infra*, pp. 3-4) provides that a person whose claim for exemption from service as a conscientious objector has been rejected by his local board may appeal to an appropriate appeal board. The appeal board is to refer the claim to the Department of Justice, which, "after appropriate inquiry," is to hold a hearing and then make a recommendation to the appeal board. The appeal board considers, but is not bound to follow, that recommendation in reaching its decision. The question presented is whether a Selective Service classification is invalid because confidential F. B. I. reports are not made available to the registrant (even though he has not requested them) at or before the hearing by a Department of Justice officer in connection with the registrant's appeal from his local board's classification.

STATUTE AND REGULATIONS INVOLVED

Section 6(j) of the Selective Service Act of 1948 (62 Stat. 604, 612-613) provides: [1]

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[1] As amended by Section 1(q) of the Universal Military Training and Service Act of June 19, 1951 (65 Stat. 75, 86, 50 U. S. C. App., Supp. V, 456(j)); Section 6(j) of the Act of 1948 differs from the original provision quoted in the text in respects which are here immaterial. See note 2, pp. 7-8, *infra*.

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, ~~be deferred~~. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice

shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

The Selective Service Regulations, 32 C. F. R. (1949 ed.), Part 1626.25, provide:

(c) The Department of Justice shall * * * make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the

armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

STATEMENT

On February 29, 1952, in the United States District Court for the Southern District of New York, a one-count indictment was returned against respondent charging him with a violation of Section 12 of the Selective Service Act of 1948 (62 Stat. 604, 622, 50 U. S. C. App., Supp. V, 462) by willfully failing to take the symbolic "one step forward" which would have completed his induction into the armed forces of the United States (R. 2). Subsequently, on April 21, 1952, respondent, hav-

ing waived a jury, was found guilty by the court and sentenced to imprisonment for a period of two and one-half years (R. 79).

On appeal, the Court of Appeals for the Second Circuit reversed the judgment of conviction (R. 91), holding that the induction order was not based upon a valid classification. The invalidity of the classification was held to arise from the fact that the confidential F. B. I. report of an investigation of respondent's claim to exemption as a conscientious objector had not been made available to him at or before the hearing by a Department of Justice hearing officer required by the Selective Service Act of 1948 (Section 6(j), *supra*, pp. 3-4) in connection with an appeal from an adverse classification by the local board. The court's decision rests on statutory rather than constitutional grounds, the holding being that the statute contemplates that the registrant shall have access to the investigative report prior to or at the hearing.

The events leading up to respondent's ultimate classification and attempted induction are as follows:

Respondent registered with his local board during September 1948. On February 2, 1949, he executed his classification questionnaire, indicating therein that he was "by reason of religious training and belief * * * conscientiously opposed to participation in war in any form" (R. 5, 43), and asserting further that, because of religious beliefs, he would serve only as a noncombatant (R. 5, 44). Nine months later, on October 10, 1950, the local

board received respondent's completed Selective Service System Form 150, a special form wherein conscientious objectors may set out the bases and reasons for their conscientious objection (R. 6, 46-60). In this form, respondent indicated that he was conscientiously opposed to participation in war in any form, including noncombatant training and service. Along with this form, respondent submitted evidence in support of his claim to exemption, including a resolution of the Bible Students General Convention, verified October 9, 1950, stating its opposition to participation in war (R. 55-56); a letter written by respondent to the local board further detailing the grounds of his conscientious objection (R. 56-58); and a resolution of the Associated Bible Students, dated November 14, 1948 (R. 59-60). On the basis of respondent's original questionnaire and the special form for conscientious objectors, together with the appended matter, the local board, on October 25, 1950, classified him 1-A, available for military service (R. 6-7). He was duly notified of this classification (R. 7).

On November 4, 1950, respondent wrote to the local board requesting a personal hearing (R. 7). The request was granted, and on February 1, 1951, a hearing was held. At the conclusion of this hearing, respondent was classified 1-A-O, a noncombatant classification for conscientious objectors (R. 8).[2] On February 5, 1951, notification of the new classification was mailed to respondent.

[2] Section 6(j) of the Selective Service Act of 1948 (*supra*,

Within ten days of the mailing of this notification, respondent notified the board that he desired to appeal from his 1-A-O classification, although that was the classification he had originally sought (R. 8-9). The appeal board directed that respondent's file be transmitted to the United States Attorney for the Eastern District of New York for the purpose of securing an advisory recommendation from the Department of Justice in accordance with the requirements of the Selective Service Act and the Regulations pertaining thereto, *supra*, pp. 2-5.

The Department of Justice conducted an inquiry through the Federal Bureau of Investigation and referred the case to a Department of Justice hearing officer. Respondent was notified to appear before the hearing officer at a hearing to be held on July 26, 1951 (R. 13). With his notice, he received a set of instructions from the office of the Attorney General informing him *inter alia* of his right upon request to be advised "as to the general nature and character of any evidence * * * which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer

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pp. 3-4) provided that persons claiming exemption as conscientious objectors could either be ordered to perform noncombatant military service (the type for which the present respondent was classified) or, if the objections were found to preclude such service, be deferred. As amended by the Universal Military Training and Service Act of June 19, 1951 (*supra*, note 1, p. 2), Section 6(j) no longer provides for deferment, now specifying either noncombatant service or compulsory performance of "civilian work contributing to the maintenance of the national health, safety, or interest * * *."

and refute at the hearing such unfavorable evidence" (R. 13, 77). At no time did respondent make any such request.[3]

At the hearing, respondent was given an opportunity again to state the grounds of his conscientious objection. He appeared for himself, and did not present any witnesses on his own behalf. The hearing officer in his report observed that the registrant's religion appeared a "free and particularly easy belief * * * calling for little effort * * *," that his references had not made a favorable impression as to his sincerity, and that the registrant had not qualified as a conscientious objector by virtue of either church affiliations, religious beliefs, or statements or affirmative actions made prior to the national emergency. In making these observations, the hearing officer made no reference to information supplied by the F.B.I. Although concluding that respondent should be classified 1-A, the hearing officer acceded to the ruling of the local board and recommended a 1-A-O classification. (R. 66-67.)

The hearing officer's report, with the complete service file of respondent, was forwarded to the special assistant to the Attorney General in charge of these matters. After a review of the entire file and records, the Department of Justice on Janu-

[3] At the trial, respondent testified that he had gone to the office of the hearing officer in order to ascertain whether there was anything unfavorable in the F. B. I. files, and upon being informed by the hearing officer's secretary that the files were favorable, made no further efforts to prepare for the hearing (R. 15).

ary 24, 1952, recommended to the appeal board that respondent's claim to exemption from military service should be sustained as to combatant service only (R. 68-69).

The appeal board, having before it the complete selective service file, including the hearing officer's report and the recommendation of the Department of Justice, voted on February 4, 1952, to continue respondent in class 1-A-O (R. 11). Thereafter, respondent was notified to report for induction on February 21, 1952 (R. 12). This he did, but, as indicated above, he refused to complete the induction process.

REASONS FOR GRANTING THE WRIT

In holding respondent's Selective Service classification illegal because he was not shown, at or before the Department of Justice hearing, the confidential investigative report resulting from the inquiry the Department is required to make, the decision below invalidates a procedure which has been followed in thousands of cases since 1940—a procedure which was uniformly employed during World War II under the Selective Service and Training Act of 1940, which does not appear even to have been questioned during that period, and which was known to, and evidently approved by, Congress when the relevant provisions of the 1940 Act were adopted unchanged in the Selective Service Act of 1948. Since the procedure in question applies to many thousands of cases already processed, now pending, and certain to arise as admin-

istration of the Selective Service Act continues, the issue in this case is one of great importance. Moreover, the resolution of this issue by the court below conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Imboden* v. *United States*, 194 F. 2d 508, certiorari denied, 343 U. S. 957, which, in holding constitutional the procedure followed in this case, implicitly sustains the view that this procedure is authorized by the Act. Because the question presented is obviously important and because we believe the court below has erred, we submit that there is need for review by this Court.

1. Under Section 5(g) of the Selective Service and Training Act of 1940 (54 Stat. 885, 889), which was identical in every material detail with the provision involved here (Section 6(j), Act of 1948, *supra*, pp. 3-4) and under which the procedure now in dispute was employed, a total of 12,388 conscientious objector cases were referred to the Department of Justice.[4] Under the Act now in effect, a total of 4,453 cases had been referred to the Department by the end of December, 1952. In the fiscal year 1951 alone, 1990 cases were referred to the Department and 1585 were disposed of. Adhering to its long-standing policy of withholding the identity of confidential informants (cf. *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462), the Department of Justice has followed, under the 1948 Act, the unchallenged practice of World War II, under the 1940 Act, of supplying, upon request, a summary of the adverse information contained in

[4] Report of the Attorney General for 1947, p. 14.

its F. B. I. reports but of refusing to turn over the reports themselves.

Strongly supporting the propriety of the procedure the Department of Justice has followed in handling the non-binding recommendation to the Selective Service appeal board required by the 1948 (as well as the 1940) Act, are the circumstances attending congressional rejection of a proposal to dispense with the Department's role under the 1948 Act. The proposal in question would have provided an appeal to a civilian commission in place of appeal within the Selective Service System supplemented by inquiry and hearing by the Department of Justice. Opposing this change, Senator Gurney, Chairman of the Committee on Armed Services, insisted that the Committee was familiar with the appeal procedure under the 1940 Act, and that this procedure had worked satisfactorily and should be continued. He said (94 Cong. Rec. 7305, 7306):

> Our committee believes that the way the conscientious objectors were taken care of during the war worked out very well, generally, with the full approval of the country. The bill which is now pending follows the 1940 act, with very few technical amendments. * * *.
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> The * * * amendment in this proposal * * * does not seem to do anything really constructive for the conscientious objectors. Heretofore, the Department of Justice has investigated appeals which the objectors make from the local boards. The amendment places the duty upon the newly created commission.

> What we are after really are the facts, and the Department of Justice has always shown itself perfectly capable of uncovering the facts. A new commission for that purpose is not necessary.
>
> The local selective service board, which classifies these men, would have no way in which to ascertain whether or not they were simply attempting to evade service, rather than having a bona fide conscientious objection. Therefore, striking that part of the section having to do with investigation by the Department of Justice would preclude the thorough investigation needed in these cases.

We submit that, in reenacting unchanged the pertinent provisions of the 1940 Act, Congress in effect voiced its approval of the administrative practice with which it was familiar. The inquiry and hearing by the Department of Justice continue to be a means of "uncovering the facts" in aid of the Selective Service System. The Department continues to perform only an investigative and recommending function, lacking the power of decision. Nothing in the unaltered statutory scheme justifies the novel requirement of the decision below that confidential reports prepared in the course of the Department's inquiries be disclosed to the registrant at the Department's hearing—particularly where, as here, the registrant does not even request such disclosure.[5]

2. In *Imboden* v. *United States*, 194 F. 2d 508,

[5] Cf. note 3, *supra*, p. 9.

certiorari denied, 343 U. S. 957, the Court of Appeals for the Sixth Circuit rejected the contention that due process was denied by failure to disclose to a registrant the names and addresses of informants interviewed by the F. B. I. in the course of an appeal proceeding like the one involved here. Implicit in that decision is the premise, squarely contrary to the decision below in the instant case, that such a procedure is authorized by the statute. For there would otherwise have been no occasion to reach the constitutional issue.[6]

Beyond this implicit, though essential, conflict, the *Imboden* conclusion that the procedure in issue satisfies due process is plainly inconsistent with the view adopted below (R. 89-90) that, because Congress proclaimed generally that its selective service system should be "fair and just" (50 U.S.C. App., Supp. V, 451), registrants claiming exemption as conscientious objectors must be shown confidential F.B.I. reports prepared in investigating their claims. As the Court of Appeals for the Sixth Circuit observed (194 F. 2d at 513), deferment from military service is a privilege within the discretion of Congress.[7] In enhancing this privilege by af-

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[6] Compare the observation of the court below, referring to the *Imboden* case, that (R. 90): "We are not to be understood as deciding whether, if the statute provided that such a report should not be disclosed, it would be unconstitutional." It is noteworthy in this connection that in his brief below respondent argued solely that the hearing failed to satisfy constitutional due process requirements, making no allegation of any statutory inadequacy.

[7] "The exemption [of conscientious objectors] is viewed as a privilege." S. Rep. 1268, 80th Cong., 2d Sess., p. 14. See also, *United States* v. *Macintosh*, 283 U. S. 605, 624.

fording an independent, advisory review by the Department of Justice, Congress cannot be presumed to have intended invalidation of the Department's well-known policy of treating its investigative reports as confidential. Charged with the urgent task of raising an army, agencies of the Selective Service System do not act as courts. Procedural fairness, for statutory as well as constitutional purposes, varies with the nature of the problem for which the proceeding is designed. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 544.

Viewed in its context, we think the procedure condemned by the court below is clearly adequate. Withholding only the identities of its confidential informants, the Department of Justice supplies a registrant upon request with a summary of the evidence and contentions brought forward against him. If the charges made relate to specific occurrences which are provably false, he has opportunity to make such proof. If the adverse evidence tends to show an irreligious or non-pacific state of mind, this can be effectively overcome by the registrant's own demeanor before the hearing officer and by the testimony of persons close to him who have observed, and perhaps influenced, the intellectual development that eventuated in his conscientious objection.

3. Tested by its results, the fairness of the procedure followed by the Department of Justice is readily demonstrable. While leaving the responsibility for final determination with the Selective

Service Boards, Congress created the investigative and advisory function of the Department of Justice as a means of assuring more sympathetic treatment to conscientious objectors.[8] And this objective has been realized. During the period ending June 30, 1946, out of 2,134 registrants claiming exemption from combatant training and service, the Department recommended that 64.6 percent be granted the claimed exemption.[9] In 7,003 cases involving claims of conscientious objec-

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[8] As originally introduced, the Burke-Wadsworth bill, which became the Selective Service Act of 1940 (S. 4164, H. R. 10132, 76th Cong., 3d Sess.), merely provided in Section 7(d) for exemption of conscientious objectors from combatant training and service, without any special procedure for examining claims of conscientious objectors. Suggestions were offered by those concerned with the special problem of conscientious objectors for separate consideration of such claims by a civilian board, as under the British National Service Act of 1939. See testimony by representatives of the Society of Friends and of the American Civil Liberties Union, Hearings before the Senate Committee on Military Affairs on S. 4164, 76th Cong., 3d Sess., pp. 164, 309-320. The proposal for inquiry and hearing by the Department of Justice was evolved in response to these suggestions. S. Rep. No. 2002, 76th Cong., 3rd Sess., p. 9. As originally reported out of committee, the bill provided for a recommendation by the Department of Justice in all objector cases, subject to the right of either the objector or the local board to appeal to the appropriate appeal board under the Selective Service System (Section 5(d), S. Rep. No. 2002, *supra*). The House voted to eliminate the provision for reference of conscientious objector cases to the Department, and provided merely for appeal under the Selective Service System. The present procedure by which the claim is referred to the Department only when an appeal has been taken from the decision of a local board, and the recommendation is to be merely an advisory one to the appeal board, was worked out in conference. See Statement of the Managers on the part of the House, 86 Cong. Rec. 11211-12212.

[9] Selective Service System, Monograph No. 11, "Conscientious Objection" (1950), vol. I, p. 145.

tion to both combatant and noncombatant service, the Department recommended complete exemption for 49.2 percent and exemption from combatant service for 13.9 percent.[10] Observing "that almost all of these registrants had their claims denied previously by one or two classification agencies of the System," a monograph of the Selective Service System records the inescapable conclusion that "the general effect of the consideration given by the Department of Justice to objector cases was to recommend that Selective Service appeal and local boards be more liberal in granting the claims of such registrants."[11]

These concrete results refute, we think, the conclusions of Judge Hincks in *United States* v. *Geyer*, 108 F. Supp. 70 (D. Conn.) upon which the court below principally relied (R. 89-90). Experience has shown that independent, advisory review of a conscientious objector's claim by the Department of Justice is likely to be of real benefit, belying the view that the Department's hearing has no point except "to give the registrant opportunity to meet the contents of the [Department's F.B.I.] report" (R. 89). This view overlooks, of course, the fact that, while the registrant is not supplied with the identities of persons who have supplied the Department with information, he is entitled to a summary of any information which may be adverse to him and is afforded an opportunity at the hearing to meet and contest any such

[10] *Id.*, p. 146.
[11] *Ibid.*

information. The mere fact that Congress provided for a "hearing," as well as an "appropriate inquiry," in defining the Department's advisory task, is no ground for concluding that this task is not fairly and adequately performed unless the Department's confidential reports are disclosed to the registrant. For the nature of a proper hearing varies with the circumstances for which it is provided; in the circumstances considered here, we think it obvious that Congress intended only that a registrant should have an opportunity to present his case before the Department of Justice to assist in formulation of the Department's independent, purely advisory recommendation. Cf. Davis, *Administrative Law* (1951), sec. 78.

Equally erroneous is the argument (R. 89), that, unless it is accompanied by the F.B.I. report, the Department's recommendation is not susceptible of intelligent evaluation by the Selective Service appeal board. As the record shows (R. 66-69), the recommendation was accompanied by a statement of its grounds, including a summary of the information in the Department's investigative report, together with the report of the Department's hearing officer.[12] These materials, we submit, amply perform the advisory function with which Congress charged the Department of Justice.

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[12] Under a recent change in the Selective Service Regulations, the hearing officer's report no longer goes forward with the Department's recommendation. See 17 Fed. Reg. 5451 (June 18, 1952), amending 32 C. F. R. § 1626.25. Instead, the recommendation itself is expanded to incorporate the factual findings formerly contained in the hearing officer's report.

There is nothing in the statutory description of that function, discharged for over a decade in the manner now condemned by the court below, which requires departure from the Department's settled policy of not disclosing confidential sources of information.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER J. CUMMINGS, JR.,
Solicitor General.

JANUARY 1953.

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